Filed 1/13/14 Cutler v. Azur Pharma International III Limited CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

NEAL R. CUTLER, Plaintiff and Respondent, v. AZUR PHARMA INTERNATIONAL III LIMITED et al., Defendants and Appellants.	B245306 (Los Angeles County Super. Ct. No. BC471775)

APPEAL from a judgment of the Superior Court of Los Angeles County, Steven J. Kleifield, Judge. Affirmed.

Simpson Thacher & Bartlett, Michael D. Kibler, Michael G. Freedman Rachel N. Agress for Defendants and Appellants.

Arnold & Porter, John D. Lombardo, E. Alex Beroukhim and Sean M. SeLegue for Plaintiff and Respondent.

An arbitrator issued a final arbitration award ruling that a dispute is not arbitrable because it is not within the scope of the applicable arbitration agreement. The trial court denied a petition to vacate the arbitrator's award while granting a petition to confirm the award. We affirm the trial court's confirmation decision because, regardless of whether or not the arbitrator "correctly" ruled on the issue of arbitrability, he did not "exceed his powers" within the meaning of the arbitration statutes. (See Code Civ. Proc., § 1286.2, subd. (d).)[1] The parties bargained for a ruling on the issue of arbitrability, the arbitrator gave them a ruling on the issue. Confirmation is thus appropriate. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 13-28.)

FACTS

General Background

Neal R. Cutler, M.D. filed an action alleging claims for breach of two contracts and related wrongs against Azur Pharma International III Limited.[2] Azur filed a petition to compel arbitration pursuant to an arbitration clause contained in one of the contracts. Cutler opposed arbitration on the ground that he was not a signatory to the contract with the arbitration clause. The trial court entered an order compelling arbitration, ruling that Cutler, having filed suit for relief based on the contract with the arbitration clause, was equitably estopped from asserting that he was not bound by the arbitration clause.

At an initial hearing in the arbitration forum, Cutler and Azur "agree[d] that the Arbitrator may determine any issue of arbitrability or its scope." The arbitrator thereafter issued a final award in which he ruled that the parties' disputes are not arbitrable because they are outside the scope of the arbitration clause.

---

[1] All further section references are to the Code of Civil Procedure except as otherwise stated.

[2] Defendant and respondent Azur Pharma International III Limited is alleged to be a Burmuda corporation; defendant and respondent Azur Pharma is alleged to be an Ireland corporation. Both entities are represented by the same counsel. Hereafter, we refer to the defendants and respondents collectively as Azur.

Cutler filed a petition to confirm the arbitrator's award; Azur a petition to vacate the award. The trial court entered an order confirming the arbitrator's award, lifted a stay on litigation in the court, and directed Azur to file a response to Cutler's complaint. Azur filed an appeal, bringing to us for review the trial court's order confirming the arbitrator's determination that there will be no arbitration of the parties' dispute on the substantive merits of Cutler's claims.

FazaClo

Cutler is a pharmaceutical investor and entrepreneur who started non-party Alamo Pharmaceuticals, LLC. Through Alamo, Cutler developed "FazaClo," a drug treatment for schizophrenic patients.

In May 2006, Cutler sold his interest in Alamo to Avanir Pharmaceuticals (a named defendant in the trial court, but not appearing in the current appeal) under a contract which is identified in the briefs on appeal alternatively as the "Unit Purchase Agreement" or "UPA" or "Avanir Agreement." Alamo then became a wholly owned subsidiary of Avanir. Avanir paid Cutler in the form of money and assumed debt for his interest in Alamo. As relevant to the current appeal, Avanir further agreed that Cutler would receive "Contingent Payments" if revenue from certain FazaClo products reached defined milestones by a specified date.

The Contingent Payments provisions in the UPA required Avanir to provide Cutler with quarterly reports setting forth "in reasonable detail" the net product revenues for each month of each fiscal quarter. The quarterly reports were required to be prepared "in accordance with GAAP [Generally Accepted Accounting Principles] applied on a basis consistent with the preparation of [Avanir]'s consolidated financial statements."

Azur Comes into the Picture

In July 2007, Avanir and defendant and appellant Azur entered a contract which the parties identify alternatively as the "Asset Purchase Agreement" or "APA" or "Azur Agreement." Under the terms of the APA, Azur purchased certain assets and assumed certain liabilities from Avanir and its subsidiary, Alamo, including the FazaClo brand. Among the "Assumed Liabilities" that are identified in the APA are "the UPA

Payments," which are defined to mean 'the Contingent Payments . . . as such terms are defined in the Unit Purchase Agreement," which is defined to mean "that certain Unit Purchase Agreement by and among [Avanir and Alamo] and certain other parties listed therein, dated as of May . . . 2006."

The APA consists of several separate parts each labeled "Article." For example, Article I sets forth "Definitions"; Article II sets for the terms for the "Purchase and Sale of Assets"; and Article III sets forth terms for the "Closing" of the APA.

Article IX of the APA sets forth "Post-Closing Covenants." Within Article IX, Section 9.3 reads:

> "Indemnification. [¶] (a) Subject to the provisions of this Article IX, after the closing, the Selling Parties [Avanir and Alamo] shall indemnify and hold harmless Buyer [Azur] and its Affiliates and Buyer's and such Affiliates' respective Representatives, and each of their respective successors and assigns (collectively, the 'Buyer Indemnified Parties') from and against all losses liabilities, damages, (excluding, except as stated in the last paragraph of Section 9.9, consequential, incidental, special or punitive damages), Actions, Claims, judgments, injunctions, orders, decrees, rulings, settlements, costs, expenses (including reasonable fees and expenses of counsel, consultants, experts and other professional fees), demands, penalties, fines, interest and assessments (collectively, 'Damages') incurred by the Buyer Indemnified Parties or any of them arising from or as a result of: [¶] (iv) the indemnification obligations of the Selling Parties under Section 3.3 and 6.8(f) hereof."
>
> Section 9.3 further provides:
>
> "(b) *Subject to the provisions of this Article IX*, after closing, *Buyer shall indemnify and hold harmless each of the Selling Parties* and their Affiliates and the Selling Parties' and such Affiliates' Representatives, and each of their respective successors and assigns (collectively, the 'Seller Indemnified Parties') from and against all *Damages as incurred by the*

Seller Indemnified Parties or any of them arising from or as a result of: [¶] (iv) any Assumed Liabilities." (Italics added.)

Section 9.4 sets forth "Indemnification Procedures," and defines an "Indemnified Party" as a party "claiming indemnification" under the APA "with respect to any Claims asserted against it by an unaffiliated third-party (a 'Third-Party Claim')," and defines an "Indemnifying Party" as "the party from whom indemnification is sought." Other subdivisions within section 9.4 explain the rules for giving notice of third-party claims, and defense of such claims.

Section 9.4(f) reads:

"If the Indemnifying Party has disputed a Claim for indemnification (including any Third-Party Claim), the Indemnifying Party and the Indemnified Party shall proceed in good faith to negotiate a resolution of such dispute. If the Indemnifying Party and the Indemnified Party are unable to resolve such dispute regarded a Contested Amount within third (30) days after delivery of the Dispute Notice, such dispute shall be resolved by confidential binding arbitration as provided in Section 10.15. Neither party shall have the right to offset any amounts owed to the other party for Damages such parties is otherwise entitled to recover unless so determined by the arbitrator or such amount is an Agreed Amount."

Section 9.7 reads:

"Exclusive Remedy. From and after the Closing, except for any equitable relief to which any party may be entitled or in the case of actual fraud, *the indemnification provisions of . . . this Article IX shall be the sole and exclusive remedy with respect to any and all claims relating to the subject matter of this Agreement and no party shall pursue or seek to pursue any other remedy. In furtherance of the foregoing, Buyer hereby waives, to the fullest extent permitted under applicable Law, any and all rights, Claims and causes of action it or any of its Affiliates may have*

against the Selling Parties arising under or based upon any Law." (Italics added.)

Also within Article IX is section 10.15, which reads as follows:

> "If *any controversy or claim arising out of or relating to this Agreement* or any Ancillary Agreement, *or the breach thereof,* cannot first be resolved by the parties within thirty (30) days after the written notice thereof, then either party may submit the controversy or claim to confidential binding arbitration in accordance with the JAMS Comprehensive Arbitration Rules and Procedures then in effect. The arbitration will be conducted by one arbitrator, mutually selected by the Indemnified Party and the Indemnifying Party; *provided, however*, that if *the Indemnified Party and the Indemnifying Party* fail to mutually select an arbitrator within fifteen (15) Business Days after the contested portion of *the indemnification claim* is submitted to arbitration, then the arbitrator shall be selected by JAMS in accordance with its Comprehensive Arbitration Rules and Procedures then in effect. . . . The final decision of the arbitrator shall be furnished in writing to *the Indemnifying Party and the Indemnified Party* and include (a) the dollar amount of the award to *the Indemnified Party*, if any, and (b) a determination as to whether either party to the arbitration shall be required to bear and pay all or a portion of the other party's attorneys' fees and other expenses relating to the arbitration." (Italics added.)

The APA defines "Claim" to mean "any claim, demand, cause of action, chose in action, right or recovery or right of set-off of whatever kind or description against any Person." The APA also expressly identifies Cutler *by name* as a third-party beneficiary of the APA entitled to "full rights of enforcement as though such Person was a signatory to this Agreement with respect to . . . the obligations relating to the Contingent Payments [under the UPA]."

Cutler's Lawsuit

For a number of years after the APA closed, Azur provided Avanir with quarterly reports concerning FazaClo product sales, and Avanir, in turn, would forward the reports to Cutler. When Cutler had questions concerning the quarterly reports, he would direct them to Avanir, and Avanir would forward the questions to Azur. Over time, Cutler began accepting reports directly from Azur, and sending inquiries directly to Azur.

Sometime around spring 2011, all of the parties associated with FazaClo began to have growing expectations that competition from generic products would be coming in the near future, and that this competition would close the window for net revenues from FazaClo product sales to reach the "Contingent Payment" milestones set forth in the UPA. During the same time frame, Cutler began demanding more financial information from Azur, and, for the first time, he began questioning Azur's accounting practices and marketing decisions. Eventually, Azur offered to make its books and records available at its offices for an audit by Cutler in accord with the terms of the UPA.[3]

In October 2011, Cutler filed a complaint against Azur and Avanir. Cutler's complaint alleges four causes of action, listed respectively, as follows: breach of contract against Avanir arising from the UPA; breach of contract against Azur arising from the APA – with Cutler expressly owed duties under that agreement; breach of the implied covenant of good faith and fair dealing against both Avanir and Azur; and tortious interference with contractual relations against Azur.

Arbitration Compelled

In December 2011, in Cutler's court case, Azur made a "special appearance" to file a petition to compel arbitration under the Federal Arbitration Act and the arbitration clause contained in the APA. Cutler opposed the petition, arguing that he was not a signatory to the APA.

---

[3] ("Upon reasonable notice, the Buyer shall make available to Sellers' Representative ... during normal business hours all of the books, records, personnel and workpapers used to prepare each Contingent Payment Quarterly Report.")

On March 14, 2012, the parties argued the arbitration petition to the trial court, and the court took the matter under submission. Later that day, the court issued an 11-page decision granting Azur's petition to compel arbitration. The trial court made several findings, including the following:

"[Cutler] is clearly suing under the APA as a third party beneficiary of the contract, which contains an arbitration clause. The court finds . . . *JSM Tuscany, LLC* [*v. Superior Court* (2011) 193 Cal.App.4th 1222] to be controlling. [Cutler] is equitably estopped from repudiating the arbitration agreement in the APA."

"To the extent that the doctrine [of equitable estoppel] requires a finding that application of the doctrine to a particular case is equitable, the court finds that such is the case here. [Cutler] received direct benefits from the APA -- he was a third party beneficiary entitled to payments from Azur, as well as quarterly reports."

"[Cutler] received indirect [APA] benefits as well. [He] was concerned about the financial health of Avanir, the company which had financial obligations to him. Its financial health had apparently deteriorated to the point that it sold its assets to Azur, while simultaneously paying [Cutler] $11 million."

Cutler filed a petition for writ of mandate in our court to challenge the order granting Azure's motion to compel arbitration. We summarily denied Cutler's writ petition. (*Cutler v. Superior Court* (May 11, 2012, B240181)

Arbitration

Azur submitted a statement of claims initiating arbitration in accord with the JAMS Comprehensive Arbitration Rules and Procedures as specified in the arbitration agreement. Azur's statement of claims included a prayer for "[a]n award declaring that Contingent Payment obligations have not been triggered."

At a preliminary hearing with the arbitrator on June 4, 2012, the arbitrator set a date for the arbitration hearing, and a discovery schedule for production of documents and depositions. Also at that hearing, the following agreement concerning the arbitration was reached: "The parties agree that that the Arbitrator may determine issues of arbitrability or its scope."

In June 2012, Cutler filed a letter brief in support of his challenge to the arbitrability of his claims. Specifically, Cutler sought a complete dismissal of the arbitration, arguing that the trial court left open the question of whether Cutler's claims were subject to the arbitration agreement. Further, Cutler argued that language in the arbitration agreement referencing "indemnification" and "indemnifying party" as between the buying and selling parties identified in the APA between Azur and Avinar should be construed to limit the arbitration agreement so as to exclude Cutler, who was not a party (or a party affiliate) to the APA.

In opposing Cutler's motion to dismiss the arbitration, Azur argued that because the trial court had "already held that Cutler 'is clearly suing under the APA'," this meant the parties dispute "unmistakably [fell] within the APA's broad arbitration clause calling for arbitration of 'any controversy or claim arising out of or relating to this Agreement . . . ." Further, because the trial court had held that Cutler is suing under the APA as a third party beneficiary, he "stands," stated Azur, "in the shoes of a signatory," and his claim for Contingent Payments "would fall within the scope of the arbitration clause."

On July 25, 2012, the arbitrator issued a "Final Award" in which he ruled that the "claims, counterclaims, and affirmative defenses are dismissed *as non-arbitrable* without prejudice to the merits." The arbitrator ruled that the trial court's order of March 2012, compelling arbitration, was consistent with the JAMS Rules stipulated to by the parties, and empowered him to rule on the issue of the "scope" of the arbitration clause. The arbitrator then set out the law governing the interpretation of arbitration clauses, noting that the Federal Arbitration Act governs and that the "liberal federal policy favoring arbitration" governed the analysis. The arbitrator construed the arbitration agreement in the APA between Azur and Avanir — covering "any controversy or claim arising out of or relating to this Agreement" — as "telltale buzzwords" and "pedestrian language." The arbitrator explained what he considered the *"true meaning* of the scope of the arbitration clause." The arbitrator the interpreted the APA's arbitration clause covering "any controversy or claim arising out of or relating to this Agreement or any Ancillary

Agreement, or the breach thereof" an implied limit on its scope covering *only* disputes between Buyer Indemnified Parties and Seller Indemnified Parties relating to indemnification claims identified in Section 9.3 of the APA; an interpretation that does not cover any claim brought by unaffiliated third-parties such as Cutler.

The arbitrator ruled that a claim involving Contingent Payments would fall within the scope of the APA's arbitration clause when brought by an APA signatory or affiliate: "Thus, a claim arising from or as a result of any Assumed Liabilities [including a claim for Contingent Payments] . . . falls within the scope of the arbitration clause when asserted by and between the . . . [APA-contracting parties or affiliates]." The arbitrator ruled that, because Cutler is neither a Buyer Indemnified Party nor a Seller Indemnified Party, or one of their affiliates, as identified in the APA, claims brought by Cutler were no subject to the APA's arbitration clause.

Arbitration Confirmed

The parties filed competing petitions in the trial court to vacate and confirm the arbitrator's award. Cutler argued the award properly fell within the arbitrator's power to determine the scope of the arbitration, and that the trial court had previously only decided a question of "enforceability" of the arbitration agreement. Azur argued the arbitrator exceeded his powers because the trial court's previous order compelling arbitration encompassed the issue of arbitrability. Azur requested that the matter be sent back to arbitration, before a different arbitrator.

At a hearing on October 18, 2012, the trial court accepted Cutler's position. The court granted his petition to confirm the arbitrator's award, lifted the stay of the litigation, and directed Azur to respond to Cutler's complaint.

Azur filed the present appeal.

DISCUSSION

I. Appealability

Cutler has filed a motion to dismiss Azur's appeal. The motion argues that Azur is not an aggrieved party under a trial court order denying a petition to compel arbitration (see § 1294, subd. (a)), nor an order dismissing a petition to vacate an arbitration award (see § 1294, subd. (b)), nor an appealable judgment entered pursuant to the arbitration statutes (see § 1294, subd. (d)). We find the trial court did enter an appealable judgment confirming the arbitrator's award. (*Ibid*.)

In this state, "Special Proceedings of a Civil Nature" are governed by Part 3 of the Code of Civil Procedure. (§ 1063 et seq.) Title 9 of Part 3 (§ 1280 et seq.) governs trial court proceedings involving arbitration, such as enforcement of arbitration agreements by petitions to compel arbitration (§ 1281 et seq.), and enforcement of arbitration awards by petitions to confirm such awards (§ 1285 et seq.). The right to appeal from a trial court proceeding involving arbitration is governed by section 1294 et seq.

We agree with Cutler that the trial court did not enter an order denying a petition to compel arbitration. (§ 1294, subd. (a).) Azur got to go to arbitration; the trial court *granted* its petition to compel arbitration. Azur's argument that the trial court's order confirming the arbitrator's award is the substantive equivalent to an order denying Azur's petition to compel arbitration is not persuasive. Again, we reiterate that Azur got to go to arbitration. The fact that Azur ultimately "lost" in the arbitration forum in the sense that it did not obtain a decision, on the merits, of the parties' disputes — due to the arbitrator's ruling on scope arbitrability — does not mean that Azur's contractual right to arbitration was denied. In the end, Azur's argument essentially boils down to a claim that it never obtained a *court's* interpretation of the scope of the parties' arbitration agreement. The absence of a court's interpretation of the parties' arbitration agreement here is not dispositive of the appealability issue in our view. The whole point of arbitration is that an arbitrator decides issues assigned to him or her by the parties, and that is exactly what occurred here. The absence of a court's determination on arbitrability does not mean that a court rendered a decision denying arbitration.

We also agree with Cutler that the trial court did not enter an appealable order dismissing a petition to vacate an arbitration award. (§ 1294, subd. (b).) Here, the trial court addressed competing petitions to confirm or vacate the arbitrator's award, and, on the merits of the petitions, entered an order confirming the award and denying to vacate. Azur's petition to vacate the arbitrator's award was not dismissed. It was considered; it was denied in favor of confirmation.

This brings us to section 1294, subdivision (d), which provides: "An aggrieved party may appeal from: . . . A judgment entered pursuant to [title 9]." Here, we disagree with Cutler that such an appealable judgment was not entered. Cutler is correct that the trial court expressly declined to enter a formal form of decree entitled "judgment." But we disagree with Cutler that this means we are precluded from finding that an appealable judgment under the arbitration statues was entered. The trial court's order of October 18, 2012, in substance and effect, constituted a final determination confirming an arbitrator's award — namely, the arbitrator's decision that there will be no arbitration on the merits of the dispute between Cutler and Azur. The trial court's order leaves no further issue concerning the arbitration proceedings in the court for future consideration. We find the trial court's final and whole adjudication of the arbitration issues presented to constitute an "appealable judgment" within the meaning of section 1294, subdivision (d).
In determining whether an appealable order or judgment exists, "'[i]t is not the form of decree but the substance and effect of the adjudication which is determinative.'" (See *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 698, 700 (*Griset*) [a "judgment" on a petition for writ of traditional mandate that is coupled with other causes of action is not actually a "judgment" for purposes of appeal so long as the other causes of action remain pending; there is no applicable statute making an adjudication on a petition for writ of mandate an independently appealable order or judgment].)

The question remains whether Azur should be permitted to appeal from the appealable judgment under section 1294, subdivision (d), at this point in the litigation. We think so. The issue in our view largely comes down to the applicability of the one final judgment rule in the context of the arbitration confirmation judgment involved here.

And, in our view, *Griset, supra*, 25 Cal.4th at page 698 and *Rubin v. Western Mutual Ins. Co*. (1999) 71 Cal.App.4th 1539 (*Rubin*) support the conclusion that the appeal on the confirmation judgment here should proceed.

As noted above, the Supreme Court in *Griset* ruled that a "judgment" on a petition for writ of traditional mandate that is coupled with other causes of action is not actually a " final judgment" for purposes of appeal so long as the other causes of action remain pending. In making this determination, the court noted that there is no applicable statute making a final adjudication on a petition for writ of mandate an independently appealable order or judgment. (*Griset, supra*, 25 Cal.4th at pp. 698, 700.) Here, in contrast, there is such a statute, namely, section 1294, subdivision (d). When, as here, a petition to confirm an arbitration award is coupled with remaining causes of action, an adjudication that finally resolves all of the arbitration issues between the parties is an appealable judgment under section 1294, subdivision (d).[4]

In *Rubin*, Division Five of our court ruled that a judgment confirming an arbitration award that fixed the appraisal value of an insurance loss was not a final judgment within the meaning of section 904.1, and, thus, was not appealable. (*Rubin, supra*, at pp. 1546-1548.) This was so, reasoned our colleagues, because the element of the value of the loss was an included aspect of the plaintiff's broader claims that the insurer had acted wrongly in resolving an insurance claim. Here, contrary to *Rubin*, the arbitration confirmation does not merely resolve an "element" of the claims between Cutler and Azur, and we see no statutory impediment to an appeal from the arbitration confirmation judgment that finally resolves whether there will be an arbitration of the parties' dispute on the merits.

---

[4] Allowing an appeal in the context presented in the current case makes sense. The trial court would have discretion to stay proceedings in court pending a decision on appeal whether there will ever be an arbitration on the substantive merits of the parties' dispute. Not allowing an appeal would mean that a court would be *required* to preside over litigation to a final judgment on the remaining causes of action, followed by an appeal addressing arbitrability. If the parties' dispute was ruled arbitrable on appeal, all of the trial court's time and efforts as to the judicial proceedings may have been wasted as the dispute would be referred, after the fact, back to arbitration.

The trial court here was appropriately concerned with the one final judgment rule (see, e.g. *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097) in declining to enter a formal decree of judgment on Cutler's petition to confirm, given that the merits of the parties' dispute over Contingent Payments between Cutler and Azur remains pending. Nonetheless, we are satisfied that section 1294, subdivision (d), may be applied here in light of the final adjudication that there will be no arbitration on the merits of the parties' dispute. We see a difference between a judgment confirming an arbitration award that addresses one element of broader claims between parties, and a judgment confirming an arbitration award that there will be no arbitration on the merits.

II. Arbitrability

Azur contends the trial court's judgment confirming the arbitrator's award that the parties' dispute is not arbitrable under the parties' arbitration agreement must be reversed and replaced with an order vacating the award because the trial court erred in failing to find that the arbitrator "exceeded [his] powers" in issuing his award. Azur bases its argument on the following rule of law: an arbitrator exceeds his powers when he issues an award that conflicts with a trial court's prior ruling that the parties are bound by an arbitration agreement. Azur cites *Malek v. Blue Cross of California* (2004) 121 Cal.App.4th 44, 56 (*Malek*) among the cases in support of its argument. Azur argues the arbitrator exceeded his powers because the trial court, at the time it compelled arbitration, had ruled that Cutler is bound to arbitrate to the same extent as the APA signatories. In summary, Azur argues (1) as a matter of law that, when a trial court rules that a certain dispute between certain parties is arbitrable, an arbitrator cannot issue an award that says otherwise, and argues (2) as a matter of historical fact, that this is what happened in the arbitration proceedings in the trial court between Azur and Cutler. We are not persuaded to find the confirmation judgment is erroneous. The trial court correctly understood that Azur was conflating two distinct principles, namely, whether a particular party is estopped to assert that he or she is not personally bound by an arbitration agreement, and whether a particular dispute, by virtue of its nature, is or is not covered by an arbitration agreement.

We are mindful that arbitration is a matter of contract, and that in formulating a contract to arbitrate "parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." (*Rent-A-Center West, Inc. v. Jackson* (2010) 561 U.S. 63; 130 S.Ct. 2772, 2777.) When clear and unmistakable evidence shows that parties have agreed to arbitration of arbitrability issues, those issues may properly be sent to an arbitrator, notwithstanding that the arbitrator could thereafter paradoxically find that the parties' arbitration agreement as a whole was invalid and or enforceable from its very inception. (*Id*. at pp. 2777-2781; and see *Peleg v. Neiman Marcus Group, Inc*. (2012) 204 Cal.App.4th 1425, 1439-1445 [generally discussing who, as between a court and an arbitrator, decides arbitrability, and the heightened standard of clear and unmistakable evidence for determining whether the issue was delegated to the arbitrator].) Basically, a part of an arbitration agreement delegating the issue of arbitrability to the arbitrator may be effectively severed from the whole of the arbitration agreement and may be enforced independently, leaving issues of arbitrability for the arbitrator, including whether the arbitration agreement covers a particular controversy. As explained in *University of San Francisco Faculty Assn. v. University of San Francisco* (1983) 142 Cal.App.3d 942, at page 953: "It is . . . established that the parties may stipulate to submit to binding arbitration the issue of whether a particular dispute is in fact arbitrable. [Citations.]"

Azur's argument that the arbitrator "exceeded his powers" here because the trial court had already ruled on the issue of arbitrability fails because the contention that the arbitrator ruled on an issue upon which the trial court had already ruled is not a correct rendition of the history of the proceedings. There is no dispute that the trial court entered an order on March 14, 2012, granting Azur's petition to compel arbitration. At that time, the court ruled that Cutler *was estopped to assert that he was not personally bound by the arbitration agreement*. But that order compelling arbitration did not include a ruling on the issue of scope arbitrability. Specifically, the court did not rule whether Cutler's particular claims against Azur were covered by the arbitration agreement, thus foreclosing the arbitrator from addressing the issue.

The trial court's order on March 14, 2012, granting Azur's petition to compel arbitration ruled that Cutler was estopped from asserting that he was not bound by the arbitration clause in the APA. We read the court's order, as did the arbitrator, and as did the trial court in later addressing confirmation, not to have addressed the issue of scope arbitrability. Further, the record supports that the parties themselves read the trial court's order of March 2012 the same way. In the very first hearing in the arbitration forum, "[t]he parties agree[d] that the Arbitrator may determine any issue of arbitrability or its scope."

Azur's opening brief on appeal includes no mention of the parties agreement that the arbitrator could decide the issue of arbitrability, and offers no argument as to why the agreement should not be the beginning and end of our analysis of Azur's appeal. On the contrary, rather than addressing the matter head-on, Azur argues on appeal that it "relied on the preclusive effect [of the trial court's order compelling arbitration]." The unstated implication of Azur's argument is that it either saw no reason to object, or gave up trying to object, to the arbitrator deciding arbitrability. We think not. No matter how Azur may try to spin past events now, the record shows Azur agreed to the arbitrator deciding arbitrability. First, that is expressly what the arbitrator's first report states. Second, in Azur's opposition to Cutler's motion to the arbitrator to dismiss the arbitration, Azur itself solicited a ruling from the arbitrator on arbitrability. Third, Azur has never denied that it had agreed that the arbitrator could decide the issue of scope arbitrability.

Azur's attempt on appeal to create the impression that it did object to, or that it did not agree to, the arbitrator deciding arbitrability is not persuasive. Azur's opening brief on appeal relies on isolated passages plucked from papers that it filed in the trial court and with the arbitrator. For instance, in Azur's opposition to Cutler's motion to the arbitrator to dismiss the arbitration, Azur stated that the trial court "already held that Cutler's claims . . . are for breach of the APA. Thus, Cutler's claims necessarily fall within the broad scope of 'any controversy or claim arising out of or relating to' the APA." This was not an objection to the arbitrator deciding the issue of the scope of the arbitration agreement nor an assertion that arbitrability had already been decided; it was a

substantive argument on the merits of the issue of scope arbitrability. In other words, this was Azur's argument for why it should *win* the arbitrability issue, not a showing that it objected to the issue being decided by the arbitrator. Basically, Azur was arguing that the arbitrator should consider the trial court's ruling that Cutler was estopped from asserting he was not bound by the arbitration agreement when the arbitrator decided scope arbitrability.

We find it would be unfair at this point to abide Azur's attempt to avoid its agreement with Cutler that the arbitrator could decide arbitrability. First, Cutler found himself in the arbitration forum over his objections. Second, the trial court sent the parties to the arbitration forum with the court's understanding -- as later clarified in the confirmation context -- that the arbitrator would address scope arbitrability. Cutler and Azur (and the arbitrator) agreed that the arbitrator could decide arbitrability. Were a factual finding on intent needed in this case, we could say the record supports an inference that Azur agreed to submit the arbitrability issue to the arbitrator as a tactical choice; in the event Azur prevailed before the arbitrator on the issue of arbitrability, judicial review would be limited (see *Monscharsh, supra,* 3 Cal.4th 1), and Cutler's strenuous opposition to arbitration would be silenced. Another reasonable inference is that Azur agreed to the arbitrator deciding arbitrability in the belief that the odds were stacked in its favor in that arbitrators may have a positive view of arbitration and stand to financially gain by taking on arbitrations. All matters considered, Azur may not now disavow the forum in which the issue of arbitrability was decided. (Cf. *Paterson v. City of Los Angeles* (2009) 174 Cal.App.4th 1393, 1401 [an appellant may not change a position taken in the trial court, and assert a new and different position that would be unfair to the trial court and the opposing litigant in light of the manner in which the appellant litigated the position in the trial court].)

Next, even assuming that the trial court had ruled, at the time it granted Azur's motion to compel arbitration, that Cutler's claims are covered by the arbitration agreement, it remains undeniably and undisputedly certain that Cutler and Azur, once they stood before the arbitrator, agreed that the arbitrator could decide the issue of scope

arbitrability. As noted above, arbitration is a matter of contract; if the parties contract to alter the framework of arbitration, we know of nothing which would preclude them from doing so. And as noted above, there is nothing in the record before us to show that the arbitrator unilaterally took on the issue of arbitrability without notice to the parties and over Azur's objection. The arbitrator did not "exceed the powers" that were given him by agreement of the parties because the parties agreed to give him the power to decide arbitrability.

This then brings us to a slightly different focus of Azur's arguments on appeal. Azur correctly cites the rule of law that an arbitrator may not issue a ruling that would require a party to disobey a court order — because to do so would be "irreconcilable with the public policy requiring obedience to court orders." (See *City of Palo Alto v. Service Employees Internat. Union* (1999) 77 Cal.App.4th 327, 339-340.) We find this rule unhelpful to Azur. Even assuming the history of this case was as Azur says, that is, that the trial court had already ruled on arbitrability in relation to the nature of Cutler's claims, the arbitrator here did not unilaterally do anything requiring a party to violate that existing court order. Rather, the parties agreed that the arbitrator could rule on the issue of arbitrability. Azur confuses the context of one party violating a court order, with the context of both parties reaching agreement within or outside the framework of a court order.

We find Azur's contention that the arbitrator improperly revisited an issue that the trial court had already decided to be historically incorrect. Azur again omits critical parts of the record. Most notably, Azur ignores that the trial court ruled — in confirming the arbitrator's award — that its earlier order granting Azure's motion to compel arbitration did *not* reach the issue of arbitrability, but rather referred that issue to the arbitrator to decide. In this vein, the trial court also commended the arbitrator for correctly interpreting the court's order compelling arbitration. As the court noted: "It seems that the arbitrator understood what my order was and acted accordingly. So kudos to him." Further, the trial court noted that its referral of arbitrability to the arbitrator was made at

Azur's request. As the trial court stated: "I am convinced that [Azur] got what [it] asked for."

Azur tells us on appeal that trial court wrongly "accepted Cutler's labels drawing a distinction between the March Order [compelling arbitration] and the final award and confirmed the award." We disagree. The trial court did not accept anything from Cutler. The trial court interpreted its own rulings. Absent a strong showing for doing otherwise, "[w]e will not second-guess the trial court's interpretation of its own orders." (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 259.) The record shows that Azur itself presented two distinct issues in its petition to compel arbitration: (1) whether Cutler was estopped from arguing he is not bound to the APA's arbitration clause because he did not sign it; and (2) whether the arbitration clause's scope applied to Cutler's dispute. The distinction is not a matter of mere semantics or labels. Those issues are separate and distinct, as Azur argued and the trial court ruled. The trial court ruled on the first issue, and deferred the latter issue to the arbitrator.

The primary case Azur cites in support of its argument that the arbitrator in the current case exceeded his powers — *Malek, supra,* 121 Cal.App.4th 44 — recognizes that an arbitrator is not precluded from deciding the issue of arbitrability after arbitration has been compelled by a court. (*Id.* at pp. 57-58.) It is all really a matter of what issues have been, by the parties' agreement, reserved for the arbitrator. To the extent that Azur argues that Cutler's own actions show he did not agree to arbitrability being determined by the arbitrator, we are not persuaded.

Azur points to Cutler's prior writ proceeding in our court. Although it is true that Cutler characterized the trial court's March 2012 order compelling arbitration in his prior writ proceeding to be ambiguous as to whether arbitrability was to be decided by the arbitrator, this is not preclusive proof that Cutler did not agree to the arbitrator deciding the issue. This is what occurred. We summarily denied Cutler's writ petition, the parties went to the arbitration forum, and the parties agreed in the arbitration forum that the arbitrator could decide arbitrability. We also note that the APA expressly incorporated JAMS's rules, and that JAMS's rules expressly contemplate that an arbitrator may decide

disputes as to scope of an arbitration agreement.[5] We presume the parties to the APA understood JAMS's rules. And, to the extent there was an ambiguity, the trial court ultimately clarified the ambiguity when it explained (at the confirmation hearing) that it had allowed arbitrability to be decided in arbitration.

Azur's assertion that the trial court had already ruled on the scope of the arbitration clause underlies all of its arguments on appeal. For instance, Azur repeatedly argues the trial court ruled, in compelling arbitration, that Cutler had "stepped into the shoes" of the APA signatories and that this meant Cutler's claims were covered by the arbitration agreement to the exact extent as the signatories. We do not see that the trial court ever made the ruling Azur attributes to the court. To claim otherwise, Azur cites its own counsel's arguments, not the court's ruling. In compelling arbitration, the trial court did not rule, as Azur implies, that Cutler was "place[d] in the same position as an APA signatory bringing a claim for breach of the APA." The trial court did not rule, as Azur implies, that, "by asserting Contingent Payment claims under the APA, Cutler assume[d] the role of an APA signatory and, therefore, Cutler is subject to the arbitration clause *even if* the arbitration clause is limited to breach of contract disputes *between the parties.*" Azur's references to its own assertions do not show the trial court's true ruling.

The court ruled is that Cutler is "estopped from repudiating the arbitration agreement in the APA." That was the trial court's resolution of Cutler's staked position that, because he did not have an arbitration agreement with Avanir, and because he did not participate in negotiating the APA agreement between Avanir and Azur, and did not sign the APA, he is not bound by the arbitration clause in the APA. In the end, we simply disagree with Azur as a historical matter, that the arbitrator decided an issue the court had already resolved.

---

[5] JAMS's Rule 11(c) provides: "Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter."

Azur's arguments on appeal beg the question as to why Azur would agree that the arbitrator could rule on the issue of arbitrability that Azur already won in the trial court. We conclude as explained above, that Azur did not win in the trial court. Second, it does not matter to us why Azur agreed to reopen an issue, if that occurred; the record shows that this is what Azur did. Azur's opening brief on appeal ignores the parties' agreement in the arbitration forum regarding the arbitrabor's power to decide the issue of arbitrability. In our view, the agreement supports affirmance of the trial court's judgment confirming the arbitrator's decision that there would be no arbitration on the merits. (See generally, *J.C. Gury Co. v. Nippon Carbide Industries (USA) Inc*. (2007) 152 Cal.App.4th 1300, 1306 [a party may not argue the merits of an issue toward a desired outcome to an arbitrator, then claim in the context of judicial review "'that this was merely its way of telling the arbitrator he could not consider the issue'"].)

Finally, we reject Azur's argument that the arbitrator's award must be vacated because the arbitrator ruled in "manifest disregard of the law" in concluding that the APA's arbitration clause does not cover Cutler's claims. The circumstances under which a court may vacate a final arbitration award on the ground that the arbitrator "exceeded his or her powers" are limited. Most significantly, an arbitrator does not exceed his or her powers when he or she renders a decision that is based on errors of fact or law. (See *Moncharsh, supra*, 3 Cal.4th at p. 11; *Advanced Micro Devices, Inc. v. Intel Corp*. (1994) 9 Cal.4th 362, 381.) Noting in this opinion should be construed to fault the arbitrators decision; we merely note that if it were infected with legal error, we affirm in any event.

DISPOSITION

The judgment confirming the arbitration award is affirmed. Respondent is awarded costs on appeal.

BIGELOW, P. J.

We concur:

RUBIN, J.

GRIMES, J.